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16 IN THE UNITED STATES DISTRICT COURT  
17 FOR THE DISTRICT OF ARIZONA

18 KELVIN D. DANIEL, et al

19 Case No. 2:11-cv-01548-PHX-ROS

20 Plaintiffs,

21 v.  
22 SWIFT TRANSPORTATION  
23 CORPORATION,

**JOINT POSITION STATEMENT  
RE DISCOVERY DISPUTE**

24 Assigned to: Hon. Roslyn O. Silver

25 Defendant.

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1       **A. PLAINTIFFS' POSITION.**

2           **I. Swift's Untimely Disclosure of 38 New Witnesses and Related**  
 3           **Documents One Week Before the Close of Discovery Would Greatly**  
 4           **Prejudice Plaintiffs.**

5           Class certification discovery is to close September 14, 2012 with Plaintiff's Rule  
 6           23 motion due October 1, 2012. The critical depositions have been completed and a Rule  
 7           30(b)(6) deposition on a limited set of topics was set for September 11, 2012. However,  
 8           at 5:00 PM PT (8:00 PM Eastern Time) the night before, Swift's counsel emailed its  
 9           “Tenth Disclosure” and hundreds of pages new documents, every one of which was  
 10          generated at least a month earlier. Included in the production were 117 pages of purported  
 11          Declarations from 38 previously undisclosed witnesses, most of them current Swift  
 12          employees Defendant compiled in June and July. The next day, during business hours,  
 13          Plaintiff initiated a Rule 37 meet and confer attempt and asked that Swift stipulate that  
 14          such belated production not be used in opposing class certification as none of the new  
 15          witnesses had ever before been disclosed or identified in discovery. Defendant has not  
 16          agreed and instead served its “Eleventh Disclosure” formally listing these new 38  
 17          individuals as its intended witnesses. Witnesses and documents disclosed by Swift after  
 18          August 1, 2012 are subject to the automatic exclusion rule under Rule 37(c)(1). *See Int'l*  
*19          Flora Techs., Ltd. v. Clarins U.S.A., Inc.*, 2008 U.S. Dist. LEXIS 68889 (D. Ariz. Sept. 4,  
 20          2008); *Forbes v. 21st Century Ins. Co.*, 258 F.R.D. 335, 338-39 (D. Ariz. 2009). Swift's  
 21          counsel has been the subject of similar admonition. *Melczer v. Unum Life Ins. Co. of Am.*,  
 22          259 F.R.D. 433, 435-36 (D. Ariz. 2009).

23           **II. Swift's Unsupervised and *Ex Parte* Communications With Absent Class**  
 24           **Members Should Be Restricted.**

25           Swift's revelation of its counsel's meetings and communications with and  
 26          solicitations of declarations from absent class members described above is tantamount to  
 27          unilateral depositions and absent class member discovery considered by the Court and  
 28          then barred during the January 10, 2012 Rule 16 conference and in its January 20, 2012  
 29          Scheduling Order (Doc. 40). Swift's counsel's unexplained withholding of the identity of

1 and related documents for such individuals until the eve of class certification is even more  
 2 problematic.

3       While a defendant may communicate with absent class members, it is not without  
 4 restraint, and is often in the form of a court-approved communication. Swift made no  
 5 such request, and instead unilaterally engaged in direct communication with these  
 6 individuals, likely without disclosing the nature of the case or advising the declarants of  
 7 their right to counsel. *See Facciola v. Greenberg Traurig LLP*, 2011 U.S. Dist. LEXIS  
 8 127957, 4-5 (D. Ariz. Nov. 2, 2011). Here, Swift disseminated what appears to be  
 9 questionnaires to absent class members (mostly current employees) requesting signatures  
 10 under oath. *See Exhibit A*. As the court stated in *Holman v. Experian Info. Solutions,*  
 11 *Inc.*, 2012 U.S. Dist. LEXIS 91626, 12-13 (N.D. Cal. July 2, 2012): “Responding to the  
 12 questions is likely to require the assistance of counsel. ... See, e.g., McPhail, 251 F.R.D. at  
 13 518 (noting that each class member ‘would need to confer with Class Counsel to  
 14 understand the purpose of the request, the penalty for not filing a response, the need to  
 15 discuss all relevant information, [and] the need to refresh their recollection with  
 16 documentation’ in denying discovery request.’ ” The same is true here, where Swift never  
 17 sought leave from the Court to engage absent class members, particularly using seemingly  
 18 benign questionnaires that carry the penalty of perjury. Accordingly, Swift should be  
 19 barred from using these declarations and witnesses to support any brief, hearing or at trial.

20                  \*\*\*\*\*

21        *Pursuant to the Court's Standing Order regarding discovery disputes, Plaintiffs'*  
 22 *and Defendant's counsel certify that they have complied with L.R. 7.2(j) and the Court's*  
 23 *Rule 16 Order (Doc.40) by attempting in good faith to resolve this dispute on two*  
 24 *separate occasions through an extended teleconference*

25       **B. DEFENDANT'S POSITION.**

26       Plaintiffs appear to believe that Phase I discovery in this matter closed on August  
 27 1, but discovery closes on September 14. Over the last few months, Swift has produced  
 28 over a million pages, prepared for depositions (several of which Plaintiffs canceled

1 without notice), prepared extensive privilege logs, and prepared for a 30(b)(6) deposition  
2 noticed by Plaintiffs on August 30, which Plaintiffs canceled earlier this week. Plaintiffs  
3 object to the timeliness of the production of declarations Swift obtained in early to mid-  
4 August and produced on September 10. Plaintiffs claim Swift's production of  
5 declarations warranted the continuation of the 30(b)(6) deposition to a later date, but the  
6 declarations bear only the most tenuous connection to the topics designated and narrowed  
7 by the parties for that deposition. The declarations were produced approximately one  
8 month after obtaining them. Counsel for Swift met personally with the declarants to  
9 obtain the declarations. After Swift determined that it would use some of them to oppose  
10 certification, it timely produced them. During the meet and confer, Plaintiffs stated that  
11 the declarations had limited utility and acknowledged that the subjects addressed in the  
12 declarations did not come as a surprise. Indeed, the subjects addressed in the declarations  
13 substantiate positions asserted in Swift's prior discovery responses.

14 Plaintiffs have not been prejudiced and are free to contact the declarants. Plaintiffs  
15 have had voluminous information identifying putative class members since at least May  
16 2012 and were free to contact, and may have already contacted, putative class members,  
17 as there was no prohibition on doing so. Indeed, Plaintiffs' counsel has a website  
18 soliciting truck drivers to serve as plaintiffs in FCRA matters. Nothing in this Court's  
19 Rule 16 Scheduling Order or the hearing leading to the Scheduling Order prohibited either  
20 side from contacting putative class members. Indeed, case law expressly permits it.  
21 *Munoz v. Gimmaña Vineyards, Corp.*, 2012 U.S. Dist. LEXIS 9300 3\* 17-18 n.4 (E.D.  
22 Cal. July 5, 2012); *Parks v. Eastwood Ins. Serv.*, 235 F. Supp. 2d 1082, 1084 (C.D. Cal.  
23 2002); *Maddock v. KB Homes, Inc.*, 248 F.R.D. 229, 236-37 (C.D. Cal. 2007). Swift  
24 complied with the guidelines established by the courts in contacting the putative class  
25 members.

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27

28

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1 DATED this 13th day of September, 2013.  
2  
3

4 SNELL & WILMER L.L.P.  
5  
6

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1  
2                   **CERTIFICATE OF SERVICE**  
3

4                   I hereby certify that, on September 13, 2012, I transmitted the foregoing Joint  
5 Position Statement re Discovery Dispute to Judge Silver's chambers via facsimile  
6 (602.322.7529), and electronically transmitted the same to the Clerk's Office using the  
7 ECF System for filing and transmittal of a Notice of Electronic Filing to the following  
8 ECF registrants:

9                   Anthony R. Pecora  
10                  Dennis M. OToole  
11                  Matthew A. Dooley  
12                  Stumphauzer OToole McLaughlin  
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26                  *s/ Jeannie Fisher* \_\_\_\_\_  
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